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IN THE

Supreme Court of the United States

October Term, 1947.

No. 218.

IDA BERRY, Individually and as Administratrix of the Goods, Chattels and Credits of OLIVIA MARSHALL, Deceased,

Petitioner-Plaintiff, Appellant,

vs.

FRANKLIN PLATE GLASS CORPORATION,

Respondent-Defendant, Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

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1. Opinion Below.

The opinion of the District Court (Gourley, J.) was filed June 11, 1946 (Record, pages 9 to 23), reported in 66 Fed. Supp. 863.

The opinion of the Circuit Court of Appeals for the Third Circuit *(Per Curiam)* was filed April 30, 1947 (Record, page 24), reported in

2. Jurisdiction.

The basis on which jurisdiction of this Court is invoked does not appear in petitioner's Brief.

3. Statement of the Case.

Civil action brought by Ida Berry individually and as administratrix of the estate of Olivia Marshall, deceased, to recover damages by reason of her death. Action brought October 2, 1945. Decedent, who was a sister of the plaintiff, died November 10, 1944.

Complaint alleges that decedent died as result of exposure to silica and other ingredients from defendant's plant at Butler, Pennsylvania, the last exposure to which occurred in April, 1939, which caused her to remove to the City of New York, where she resided with the plaintiff until November 10, 1944, the date of her death. The only claim for damages contained in the complaint is an allegation of loss of services to the plaintiff (Par. 18th of the Complaint, Record, p. 7). The defendant filed motion to dismiss for the reason that the complaint fails to state a claim upon which relief can be granted. The reasons assigned in the motion were (Record, p. 3):

1. Bar of the Statute of Limitations.
2. Failure to show cause of action in Ida Berry individually.
3. Failure to show damage sustained by Ida Berry individually.
4. Failure to show damages for which the administratrix is entitled to maintain an action.

On June 11, 1946, Wallace S. Gourley, District Judge of the District Court for the Western District of Pennsylvania, filed opinion and order granting defendant's motion

to dismiss the complaint (Record, pp. 9-23). This opinion is reported in 66 Fed. Supp. 863.

The plaintiff appealed from the above order to the Circuit Court of Appeals for the Third Circuit at No. 9200 October Term, 1946. Appeal was argued before Biggs, Goodrich and Kalodner, Circuit Judges, April 7, 1947 (Record, p. 24). *Per Curiam* opinion filed April 30, 1947, affirming order of the District Court dismissing the Complaint (Record, p. 24).

4. Argument.

(a) Summary.

Right of action of Olivia Marshall, the decedent, for injuries sustained was barred by the two-year Pennsylvania Statute of Limitations more than three (3) years prior to her death. Petitioner concedes that she, in her individual capacity as a sister of the decedent, cannot recover because she is not a member of the classes permitted to recover under the Death Statute, namely, husband, widow, children or parents of the deceased. Petitioner also concedes that she cannot recover in her representative capacity under the Survival Statute because of the bar of the two-year Statute of Limitations in personal injury cases. Petitioner contends, however, that she is entitled to recover under the Amendment of 1937 to the Death Statute permitting personal representatives to recover for administrative, funeral expenses, etc. where decedent is not survived by a person of the classes entitled to recover. Respondent's position is that the right of action under the Death Statute, as amended, is *derivative* and therefore the bar of the Statute of Limitations as to such action prior to the date of the death operates as a bar of all rights of action under the Death Statute. This question is squarely decided by the Supreme

Court of Pennsylvania in *Howard v. Bell Telephone Co.*, 306 Pa. 518, 160 A. 613 (1932), citing and following decision of this Court in *Flynn v. N. Y. N. H. & H. R. R. Co.*, 283 U. S. 53 (1931). This decision, it is submitted, being a decision of the court of last resort of the state construing its own statutes, supersedes an earlier decision of the Third Circuit to the contrary in *Western Union Telegraph Co. v. Preston*, 254 Fed. 229 (1918) construing the same statute, which decision is in conflict with the reasoning of this Court in the *Flynn* case, *supra*.

(b) Petitioner, Sister of the Decedent, Individually has no Right of Action for the Death.

The Death Statute of Pennsylvania, Act of April 15, 1851, P. L. 669 (12 P. S. 1602), limits the persons entitled to recover for any injuries causing death to "the husband, widow, children, or parents of the deceased, and no other relatives." The provisions of this statute, as amended, are set forth in the opinion of the district court (Record, pp. 18, 19). Under the express language of the statute and the decisions of the Supreme Court of Pennsylvania construing it, a sister or other relative of a class not named in the statute cannot recover individually for the death: *Bause v. Kreiger*, 265 Pa. 395, 109 A. 128; *McFadden v. May*, 325 Pa. 145, 189 A. 483.

(c) There can be no Recovery under either the Death or Survival Statute of Pennsylvania because Claim of the Decedent was barred by the Two-Year Statute of Limitations of Pennsylvania prior to the Date of her Death.

The limitation of time within which the decedent could have brought an action in her lifetime was "two years from the time when the injury was done and not afterwards": Act of June 24, 1895, P. L. 236, Sec. 2 (12 P. S. 34).

In the case at bar the above limitation of two years began to run from the time of the last exposure of the decedent to the alleged noxious elements. As this exposure took place not later than April, 1939, the statute of limitations barred the action in April, 1941, more than three years prior to the death on November 10, 1944.

The above question is squarely decided in *Plazak v. Allegheny Steel Co.*, 324 Pa. 422, 188 A. 130. In this case it was held that in a common law action for injuries due to silicosis, the statute of limitations ran from the date of the last exposure while plaintiff was in the employ of the defendant.

It follows that if the plaintiff's action was *derivative,* that is, if it was dependent upon an existing cause of action in the injured party at the time of her death, plaintiff cannot recover. It also is clear that if the action is merely a continuation of the right of action of the decedent in her lifetime, there can be no recovery.

In Pennsylvania, where no suit has been brought by the injured party in his lifetime, the statutes provide for two actions which may be brought.

One of these actions is brought under the Act of June 2, 1937, P. L. 2755 (20 P. S. 321), which provides that—

> "Executors or administrators shall have power * * * to commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels: * * * "

An action brought under the above statute is merely a continuation of the right of action of the decedent in his lifetime, and the statute of limitations runs from the date of the injury to the decedent. This action is therefore barred in the present case because suit was not brought until long

after the two-year limitation expired: *Stegner, Admr. v. Fenton,* 351 Pa. 292, 40 A. 2d 473.

The measure of damages in an action brought under this statute is the pecuniary value of the life: *Pezzulli v. D'Ambrosia,* 344 Pa. 643, 26 A. 2d 659.

The Petitioner apparently concedes that her action cannot be maintained under the above survival statute. Petitioner further apparently concedes that she cannot recover under the death statute for damages sustained in her individual capacity.

The sole contention of the Petitioner, as we understand her argument, is that she can maintain her action in her capacity as administratrix "for reasonable hospital, nursing, medical, funeral expenses and expenses of administration" under the provisions of the amendment by Act of April 1, 1937, P. L. 196, to the death statute of 1851. This statute as amended is quoted in full in the opinion of the District Court (Record, pp. 18, 19).

It is submitted that there can be no recovery under the amendment of 1937 for the reason that the right of action under the death statute is derivative and therefore action cannot be maintained thereunder where the right of action of the injured party was barred at the time of her death.

The above question is, we submit, squarely decided in *Howard v. Bell Telephone Co.,* 306 Pa. 518, 160 A. 613, by the Supreme Court of Pennsylvania, which is the court of last resort in that state, in 1932. The Supreme Court in opinion by Mr. Justice Drew, said at p. 523:

> "Therefore, while the right of action given by the statute to the widow is a new one, it is dependent upon the existence of a right of action in the husband at the time of his death. The statute cannot be construed to give the widow a greater right than the husband would have if living. The plaintiff's husband extinguished his

> right of action by failing to assert it within the two year period fixed by the statute. A right of action can be extinguished as effectively by the statute of limitations as in any other way. In this case it was an absolute bar to action by the husband for many years prior to his death. From the time his action was barred, there was nothing the statute could act upon to preserve a right for the widow. There could be no preservation of a right which had ceased to exist. The logic of the situation will bear no other conclusion. To hold otherwise would be to say that a right of action which was legally dead could be revived by the death of the injured person, so as to pass a right of action to his widow or heirs."

While this case was decided prior to the amendment of 1937, the reasoning of that case and the basic principles upon which it was decided, namely, that the right of action under the death statute was derivative and therefore where the original right of action was legally dead it could not be revived by the death of the injured person so as to pass a right of action to the persons named in the statute, is clearly applicable to an action for expenses brought by the personal representative under the amendment of 1937.

The cases decided since the amendment of 1937 clearly show that the amendment is a death statute and actions arising thereunder are therefore derivative and subject to the same limitations as those arising under the original statute.

Funk v. Buckley & Company, Inc., et al., 158 Pa. Superior Ct. 586, 45 A. 2d 918 (footnote at p. 590):

> "The Act of April 1, 1937, P. L. 196, sec. 1, 12 PS sec. 1602, is also a wrongful death statute. Under it the personal representatives of the decedent may institute suit for hospitalization, funeral and administration expenses where no spouse, child or parent survives. For an illuminating analysis and comparison of all the

death and survival statutes cited in the opinion, see Goodrich-Amram Annotations sections 2201-1 to 2201-40."

In *Goodrich-Amram Annotations,* section 2201-13, the following appears:

> "The limitations which the decisions just discussed have placed around the true action for wrongful death will in all probability be held equally applicable to the action for wrongful death brought by the personal representative of the decedent to recover hospitalization, funeral and administration expenses."

Staggers v. Dunn-Mar Oil & Gas Company, 312 Pa. 269, 167 A. 785. Claim of father for maintenance, medical treatment and funeral charges for his son held derivative and barred because the son's claim was barred by the Workmen's Compensation Act.

Klingseisen v. Costanzo Transp. Co., 101 F. 2d 902, (C. C. A., Third Circuit, 1939). Amendment of 1937 cited and claim held to be derivative and barred by decedent's contributory negligence.

The amendment clearly does not give a cause of action of a different character and subject to different limitations to the personal representatives where none of the parties named in the statute survives. The amendment clearly relates to the same subject matter, namely, "injuries causing death". These identical words are used both in the original statute and the amendment. It cannot be supposed that the legislature intended an entirely different rule to be applied in construing the amendment than that applicable to the original statute.

An intention to alter period of limitation will not be inferred unless clearly expressed: *Miller v. Commonwealth,* 5 W. & S. 488 (Pa.).

A proviso annexed to a statute by amendment, moreover, must be construed in accordance with the principles governing construction of the original statute, as it becomes part of that statute: *Commonwealth to use v. Barrett,* 304 Pa. 13, 155 A. 95.

(d) The Decisions of the Court of Last Resort of the State are Binding upon the Federal Courts.

It is submitted that the decision of the court of last resort of Pennsylvania in the Howard case construing the Pennsylvania statute is binding upon the Federal Courts even though it is in conflict with an earlier decision of the Third Circuit in *Western Union Telegraph Company v. Preston,* 254 Fed. 229 (1918), construing the same statute.

This principle was applicable to the construction of statutes where jurisdiction, as in the case at bar, depended entirely upon diversity of citizenship, even prior to the decision of this Court in *Erie Railroad Co. v. Tompkins,* 304 U. S. 654, 64 S. Ct. 817.

This duty arises under Section 34 of the Judiciary Act of 1789, 28 U. S. C. A. 725.

The Federal Courts will disregard their own former decisions construing a state statute if the state courts have *subsequently* given it a different construction.

Town of Enfield v. Jordan, 119 U. S. 680, 7 S. Ct. 358.

In *Guaranty Trust Company of New York v. York,* 326 U. S. 99, 65 S. Ct. 1464, it was held, following the Tompkins case, that even in equity cases the Federal Courts were bound to follow a state statute of limitations. In that case, this Court said at p. 108, that—

"A federal court adjudicating a state created right solely because of the diversity of citizenship of the parties is, for that purpose, in effect only another court of the state • • • "

See also: *Angel v. Bullington*, 326 U. S. 713, 67 S. Ct. 657, AND —— U. S. ——.

Holmberg v. Armbrecht, 327 U. S. 392, 66 S. Ct. 582.

(e) There is no Violation of the Fourteenth Amendment.

The contention that the construction placed upon the statutes by the Supreme Court of Pennsylvania and the courts below is in violation of the Fourteenth Amendment of the Constitution of the United States is clearly without merit. The right to recover for injuries resulting in death did not exist at common law and is created solely by the statutes of Pennsylvania. The statutes applicable were all in effect prior to the time the alleged cause of action arose.

The Supreme Court of Pennsylvania in construing the death claim as derivative did not deprive the person entitled of any vested right. It simply applied a limitation statute in the same manner that the Supreme Court of the United States applied a similar limitation in the case of *Flynn v. N. Y. N. H. & H. R. R. Co.*, 283 U. S. 53, above cited.

In *Guaranty Trust Company of New York v. York*, 326 U. S. 99, 65 S. Ct. 1464, cited by the petitioner in support of this proposition, it was held that since *Erie R. R. Co. v. Tompkins, supra*, the Federal Courts were bound to follow a state statute of limitations and its application to equity proceedings as construed by the decisions of the state court to an equity proceeding in the Federal Courts.

In *Chase Securities Corp. v. Donaldson*, 325 U. S. 312, 65 S. Ct. 1137, it was held that a statute lifting the bar of the statute of limitations was not a violation of the Fourteenth Amendment.

Statutes of limitations with respect to causes of action arising after their effective date have been upheld by the courts of all jurisdictions.

United States v. Oregon Lumber Co., 260 U. S. 299, 43 S. Ct. 100, at page 299, and cases cited therein.

(f) Conclusion.

It is respectfully submitted that the decision of the court below is clearly in accord with and properly applies the decisions of the Supreme Court of Pennsylvania in holding that the petitioner's claim is derivative and therefore barred by the statute of limitations with respect to personal injury actions which had run long prior to decedent's death. Jurisdiction of the case is based solely upon diversity of citizenship. There is clearly no violation of the Fourteenth Amendment by reason of the construction of the statutes of Pennsylvania placed upon them by the Supreme Court of Pennsylvania and the lower courts.

The decision of the court below involves a construction of state statutes and is in accord with the decisions of the court of last resort of the state. The principles of construction are in accord with those of this Court in construing similar statutes. There is no federal question of substance presented.

It is submitted that the writ of certiorari should be denied.

FRANK W. STONECIPHER,
Attorney for Respondent.